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No. 78-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN MARITIME ASSOCIATION,
Petitioner

v.

W. MICHAEL BLUMENTHAL AND
AMERADA HESS CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER AMERICAN MARITIME ASSOCIATION

JOSEPH A. KLAUSNER
1800 Massachusetts Avenue, N.W.
Suite 502
Washington, D.C. 20036

THOMAS HALE BOGGS, JR.
ALLAN ABBOT TUTTLE
2550 M Street, N.W.
Washington, D.C. 20037

PATTON, BOGGS & BLOW
Of Counsel

Attorneys for petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Citing the figures and views of the Department of Commerce, the Solicitor General concedes the importance of this case.[1] The question then is whether it presents "an issue warranting this Court's review" (Opp., p. 5).

[1] He cites the potential liability of the Department as being in excess of $100,000,000. A communication of the Assistant Secretary of Commerce for Maritime Affairs (attached to the brief *amicus curiae* of the Shipbuilders Council) sets the figure at $650,000,000. The amount at risk for the domestic tanker industry as a whole is approximately $1.5 billion.

1. In his opposition, the Solicitor General correctly and fairly states AMA's position: that in § 27 of the Merchant Marine Act of 1920, 46 U.S.C. 883, as in the Interstate Commerce Act, the Congress "has exercised its authority to the fullest," so as to regulate the "flow of commerce * * * from beginning [in Alaska] to end [on the U.S. mainland]" (*Ibid.*). However, the Solicitor General urges that petitioner's argument is undercut by the enactment of § 21 of the Merchant Marine Act of 1920, 46 U.S.C. 877, which extended the coastwise laws to the territories but exempted the Virgin Islands. He admits that, "[h]ad Section 21 never been enacted, there might be room for petitioner to argue that Section 27 extends to every aspect of interstate commerce," but argues that "Section 21 forecloses any such argument" (Opp., p. 6).

By this formulation, the Solicitor General concedes that, had the refining been done in the *British* Virgin Islands, for example, § 27 would arguably apply to the entire movement, because § 21, exempting the *U.S.* Virgin Islands, in no way limits the extension of § 27 to that "aspect of interstate commerce." In this respect the Solicitor General departs from the opinion below and as well from the Treasury's view.[2]

If then there is "room * * * to argue" that § 27 encompasses a movement between coastwise points by way of an intermediate foreign port of manufacture, *a fortiori* there is an important and unresolved question whether it encompasses a movement between coastwise points which includes manufacture in a territory of the

[2] The Customs Service proposed regulations, which would exempt from § 27 coastwise movement where there is manufacture "at an intermediate port or place other than a coastwise point," defines "intermediate port or place" indifferently as either "a foreign port or place, or * * * a port or place in a territory or possession of the United States not subject to the coastwise laws." 42 F.R. 46068 (September 14, 1977); see Pet. App. A, pp. 8a-9a.

United States which for exogenous reasons was exempted from the coastwise laws.

That Congress in enacting § 21 did not intend to place the Virgin Islands on a more exalted level than foreign ports is shown by its legislative history: "Your committee, however, has no intention of weakening in any way the coastwise laws of the United States * * *." H. Rep. 2281, 74th Cong. 2nd Sess. 2 (1936).

2. The government attempts to imbue the § 21 proviso with special significance by arguing that:

> Congress has consistently refused to delete the Virgin Islands exemption despite petitioner's repeated requests that it do so in order to oust foreign vessels from the Alaska-Virgin Islands-mainland traffic in crude oil and refined petroleum products. [Opp., p.6]

Apart from the fact that the introduction of amendatory bills not acted upon by the Congress is no guide to the construction of an earlier statute (*Girouard* v. *United States*, 328 U.S. 61, 69 (1946)), the Solicitor General's contention is simply factually in error. While these bills did propose to extend the coastwise laws to the Virgin Islands with respect to the transportation of petroleum products, they were not addressed to the "Alaska-Virgin Islands-mainland traffic," if for no other reason than because that traffic did not exist. Those bills addressed the competitive advantage that respondent Hess secured over Gulf Coast refiners by being able to move a product refined from Middle East crude oil from the Virgin Islands to the East Coast on foreign bottoms, while the Gulf Coast refiner had to use U.S. flag vessels.[3] Since the oil

[3] See the testimony of Senator Bennett Johnston of Louisiana (the sponsor of S.2422, 94th Cong. 1st Sess. 1975) at Hearings on S.2422 before the Subcommittee on Merchant Marine of the Committee on Commerce, U.S. Senate, 94th Cong. 2d Sess. February 25, 1976, p. 6.

refined was foreign, there was no issue of continuous flow between coastwise points; the traffic fell squarely within § 21's exemption. Thus while those bills might be evidence that § 21 excludes from § 27 a voyage beginning at the Virgin Islands and ending at the mainland (a point not in dispute), they tell absolutely nothing about the applicability of § 27 to a continuous movement between coastwise points where there is manufacture at an intermediate point not subject to the coastwise laws.

3. We are left then with the lower court's Delphic formulation that, while manufacture or processing does not "interrupt the flow of commerce generally, such alteration * * * may yet be substantial enough to exempt those goods from the intended reach of a particular statute" (Opp., p. 6; Pet. App. A, p. 22a, n. 54). Perhaps, but by what standard are we to determine whether *this* degree of processing at *this* port is "substantial enough to exempt [*these*] * * * goods from the intended reach of [*this*] * * * particular statute?" The court of appeals offered no standard; the Solicitor General seems to suggest that § 21 can be the touchstone. But once it is conceded that movements *by way of* foreign or exempted ports are within the coverage of § 27, it is difficult to see how a geographical limitation, like § 21, exempting such a port can provide a standard for evaluating the impact of manufacturing at that port.

We respectfully submit that the Merchant Marine Act does in fact supply the relevant standard. Section 1, 46 U.S.C. 861, declares the policy of the United States "to do whatever may be necessary to develop and encourage the maintenance" of a citizen-owned merchant marine in the interest of national defense and commerce, and commands that the agencies of government shall, "in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be obtained." On the last occasion on which this Court considered § 27,

it found this declaration of policy an adequate reason to avoid an interpretation which would "in large measure defeat the prohibition of § 27." *Central Vermont Transportation Co.* v. *Durning*, 294 U.S. 33, 39 (1935). It should do no less in this case.[4]

Respectfully submitted,

JOSEPH A. KLAUSNER
THOMAS HALE BOGGS, JR.
ALLAN ABBOT TUTTLE
Attorneys for petitioner

PATTON, BOGGS & BLOW
Of Counsel

[4] Despite the Solicitor General's intimation to the contrary (Opp., p. 3, n. 3), the agency's action herein is plainly final and ripe for review. The court of appeals addressed the merits without even discussing the government's argument with respect to finality. The district found the case ripe for review under *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). Pet. App. C, p. 49a. Perhaps inconsistently with its finding of ripeness, the district court intimated doubt respecting finality, *viz.*, whether "the clearance reflects the definitive agency position on the application of the Jones Act." Pet. App. C, p. 50a. Any residual doubt is now resolved: (a) Hess is now moving 100,000 b/d of Alaskan oil on foreign bottoms to the Virgin Islands and thence to the mainland, and no forfeiture actions have been instituted; (b) the government on appeal claimed that its prior letter orders were correct and that it was bound by them. App. Br., pp. 50-51.